FILED.
NOV 18 1895
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 603.

CHARLES A. GREGORY,

Appellant,

v.

THOMAS H. TALBOT,

Appellee.

BRIEF FOR APPELLANT ON MOTION OF APPELLEE FOR DISMISSAL OF THE APPEAL.

F. A. BROOKS,

Of Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 603.

CHARLES A. GREGORY, *Appellant*, *v.* THOMAS H. TALBOT,

BRIEF FOR APPELLANT IN OPPOSITION TO THE MOTION TO DISMISS APPEAL.

I.

The motion to dismiss this appeal is put upon precisely the same ground as the motion to dismiss the appeal in cause No. 602, to wit, that the appeal is taken in the cause of Charles A. Gregory *v.* Frederic A. Pike *et al.*, originally brought in the State Court of Massachusetts (Dec. 16th, 1884), and thence removed to the United States Circuit Court for the District of Massachusetts, and there prosecuted till March 8th, 1894, when it resulted in the final decree found at pages 8 and 9 of the record as printed for the hearing of this motion.

Such is the position taken by the appellee in his motion to dismiss. The motion contains the further statement that said cause was heard and determined in said Circuit Court and thence duly taken by appeal to the Circuit Court of Appeals for the First Circuit and there finally determined in favor of the appellee, from which determination no appeal could be lawfully taken to this Court and that consequently this appeal should be dismissed.

The brief filed in support of this motion to dismiss is also the same in general as that filed by the same counsel in appeal cause No. 602.

The two briefs rest the motion to dismiss wholly upon the legal proposition that "the jurisdiction of the Circuit Court in this case was dependent entirely upon the opposite parties to the suit being citizens of different States," and the further proposition of law that "in such a case the decree of the Circuit Court of Appeals is final."

This language of the appellee in his brief is copied from the sixth section of the Appellate Courts Act, and is therefore a correct statement of the law, and if it is true that in this case between the appellant Gregory and the appellee Talbot the jurisdiction of the Circuit Court did depend entirely upon the fact of their having been citizens of different States, then it is also true, as contended by the appellee, that Gregory could not lawfully appeal from the decision of Circuit Court of Appeals to this Court.

We respectfully submit that it does not appear in this case between Gregory and Talbot, any more than it did in the case between Gregory and Mary H. Pike, No. 602, upon what ground the jurisdiction of the Circuit Court rested as between those parties respectively.

The statements contained in the motions to dismiss the two appeals (Nos. 602 and 603) and in the briefs filed with said motions are without any support whatever in the extracts from the transcripts of record in the two cases, printed for this hearing.

It does, however, appear from these extracts from the record that Gregory, in December, 1884, brought his bill of complaint in the State Court of Massachusetts against Frederic A. Pike, of Maine, and Wm. C. N. Swift, of Massachusetts, and that this suit was removed to the United States Circuit Court for the District of Massachusetts. It does appear that in the suit so removed to the Circuit Court in May, 1885, the Circuit Court made and entered a final decree on the eighth day of March, 1894, a copy of which is printed at page 8 of the record. It does not appear that the appellee, Thomas H. Talbot, was a party to that suit or was mentioned or referred to in said bill of complaint or in said final decree.

We therefore say that the appellee Talbot has failed to sustain the proposition laid down by him in his motion, that the cause in which

this appeal is taken, being the appeal cause No. 603 in this court, was originally brought by Gregory in the State Court of Massachusetts, and was thence removed to the Circuit Court, where it resulted in the decree of March 8th, 1894, and that consequently his motion to dismiss the appeal must be denied, unless it can be sustained upon some other or different ground from that specified in the motion.

II.

The appellee has taken the precaution to state another ground upon which alone, as he contends, his motion to dismiss the appeal should be sustained. He says, "moreover, the decree appealed from is one merely from the allowance of costs."

In his brief referring to this point he says, —

"No appeal can be taken from the Circuit Court of Appeals to this court unless the amount in controversy exceeds one thousand dollars besides costs. In this case there is no amount in controversy besides costs. It was costs and costs alone which was in controversy."

We here find a statement made by the appellee, himself a lawyer, that this *case* (meaning the controversy in No. 603, between himself and Gregory) turned wholly upon a question of costs, and that nothing but costs was in controversy between them.

This statement seems to us entirely inconsistent with the statement contained in the motion to dismiss, that this case (No. 603) was originally brought by Gregory against Pike and Swift in the State Court of Massachusetts in December, 1884, as set forth in the bill of complaint, printed at pages 1 to 5 of the record.

III.

Again, the statements contained in the motion of the appellee Talbot for a dismissal of this appeal, are negatived and contradicted by the petition of the said Talbot said to have been presented by him to the Circuit Court in the old equity cause (No. 2170) of Gregory, plaintiff, against Pike *et al.*, defendants, as printed at page 17 of extracts from the transcripts of record. By this petition (Rec., p. 17) it appears that the appellee Talbot applied to the Circuit Court and prayed and moved that Court —

"*. . . to order to be paid . . . to this petitioner* (himself) *a suitable compensation for professional services rendered, and as counsel fees earned*"

by him in making certain alleged collections of two certain notes made by Wm. C. N. Swift, one of $15,000 and one of $20,334.60, being the same notes described in the bill of complaint in the cause of Gregory *v.* Pike *et al.*, printed at pages 1 to 5 of the record.

The record as printed (p. 18) shows that this petition was denied or disallowed by the Circuit Court on the 8th day of March, 1894, the day of the date of the final decree in Gregory's case, and that Talbot thereupon appealed from this denial to the Circuit Court of Appeals. Rec., p. 18, top.

This appeal of Talbot was heard by the Circuit Court of Appeals and passed upon by that Court in its decree of Jan. 31st, 1895. That decree commences with a disposal of Talbot's appeal, and uses this language with reference to said appeal, —

"On consideration whereof, it is now, to wit, Jan. 31st, 1895, ordered that Thomas H. Talbot, attorney for Mary H. Pike, executrix, recover the amount for services asked for *in his intervening petition.*" Rec., p. 18, bottom.

Thus it appears from the decree of the Circuit Court of Appeals that Talbot was treated by that Court, not as a party to the old cause of Gregory and Pike deceased, but as an intervening petitioner therein, and that his claim was allowed him as such "*intervening petitioner*" and upon no other ground.

Thus it appears that the claim of Talbot was put by the Circuit Court of Appeals in its decree upon an entirely different ground from that stated by Talbot in his motion to dismiss this appeal.

IV.

In view of the fact that the extracts from transcripts of record, as printed by the appellees, Mary H. Pike and Talbot, are, or purport to, apply equally to both appeal causes (Nos. 602 and 603) and that the motions to dismiss the two appeals and the briefs filed in support of said motions are couched in the same language and the same statute citations, so that the fate of the two motions (602

and 603) will probably be the same, and that the motion in cause No. 602 will probably depend upon the question whether Mary H. Pike at the time of the final decree in March, 1894, engaged in litigation with Gregory as a party to the old equity cause of Gregory and Pike (No. 2170). We desire to refer this Court to the view taken by the Circuit Court of Appeals upon this particular subject, as set forth in their opinion filed in said cause (Jan. 31st, 1895) at the time of the final decree.

For this purpose we here copy into this brief an extract from said opinion bearing expressly upon the relation of the appellee Talbot to the old Gregory and Pike suit, and also by necessary implication (as we think) bearing upon the relation, understood by that Court to be sustained by Mary H. Pike to said old equity cause (2170), and showing (as we infer) that both the said Mary H. Pike and the said Talbot were regarded by the Circuit Court of Appeals as *intervening petitioners* in said old cause and in no other light.

OPINION OF THE COURT.

JANUARY 31st, 1895.

PUTNAM, J. "These four cases" (Nos. 98, 99, 100 and 101) "are appeals from the decree of the Circuit Court in a bill in equity, originally brought in the Supreme Judicial Court of Massachusetts, and removed to the Circuit Court. The bill was brought by Gregory against Frederic A. Pike the testator, against the present respondent, Mary H. Pike, and against William C. N. Swift, to recover two certain non-negotiable promissory notes made by Swift, and held by Mr. Pike and alleged by Gregory to be his own property. . . . The cause came to final hearing, and a decree was made as follows, on the eighth day of March, 1894.

. . . . . .

"From this decree appeals were taken by Gregory and Butterfield. Mr. Talbot also having filed in the Court below a petition for an allowance of his counsel fees and costs out of the fund, appeals from the decree because there was no allowance of the former. . . . We will first refer to the petition of Mr. Talbot. . . . He was employed by Mr. Pike and his estate to collect the notes which produced the fund now in the registry of the Court. He was not employed, either expressly or by implication, by Gregory. . . . He seems to have been acting throughout solely in the interest of Mr. Pike and of his estate. . . . By the thoroughly settled law in Mas-

sachusetts, he had no lien on the fund while on deposit on the common law side of the Circuit Court, except for his taxable costs.

. . . . . .

"There is no Federal case establishing a lien at common law in behalf of an attorney, beyond that given by the local law. The extent of the lien, therefore, of Mr. Talbot, while the fund was on the law side of the Court, was his bill of costs.

"The transfer of the fund to the equity side of the court did not change the rights of any person in the fund, so that the extent of Mr. Talbot's lien was precisely the same after the transfer as before. So far, however, as that part of the fund is concerned in which Kemp Van Ee has no interest, it is the proceeds of notes which Mr. Pike held as collateral, and his estate is entitled to be allowed, as against Gregory, the cost of realizing the collateral. This is a clear principle of law.

"Therefore the decree below should have allowed Mrs. Pike, in addition to the amount of her claim and interest, the expenses of herself and Mr. Pike in realizing the fund, *including the reasonable charges of Mr. Talbot.* . . . As Mrs. Pike makes no objection, the decree in this particular may run in favor of *Thomas H. Talbot, attorney of Mary H. Pike.*"

As we understand the above extract from the opinion, the Circuit Court of Appeals held that Talbot, as a petitioner in the Circuit Court for his fees as counsel in certain actions at law prosecuted by him against Swift upon the notes in question, had no lien upon the alleged fund in court. But that in view of the fact that his services as counsel were rendered to Frederic A. Pike in his lifetime, and after his decease to his executrix, the executrix should have been allowed all expenses reasonably incurred by her testator and herself in collecting the Swift notes held by them as collateral, and for this reason, that the Circuit Court of Appeals allowed the sum claimed by Talbot as counsel fees in actions at law not to him in his own right, but as the attorney of the testator, Frederic A. Pike, and Mary H. Pike, his executrix.

In pursuance of this opinion the order or decree of the Circuit Court of Appeals in favor of Talbot was in these words, —

"It is now . . . ordered that Thomas H. Talbot, *attorney for Mary H. Pike,* executrix, recover the amount for services asked for in his *intervening petition.*"

We understand this to mean that Talbot as an *intervening petitioner* under the right or in the name of his client, Mary H. Pike,

and only on account of such relation to her, was to be paid the sum claimed by him, and that the Court of Appeals awarded this sum to Talbot as a supposed *intervening petitioner* in the old cause (2170) and not as a litigant in his own right but in the right of his client, Mary H. Pike.

We also understand or infer that Mary H. Pike, herself (as appellee in No. 602), was also regarded by the Circuit Court of Appeals as an intervening petitioner in the right of her testator, Frederic A. Pike, the original defendant in the old equity cause (No. 2170), and not as a litigant in that old cause in her own right, as supposed and stated in her motion to dismiss appeal No. 602 and the brief there filed.

V.

We have thus far in this brief proceeded upon the assumption that the record as furnished by the respondent Talbot for this hearing, consisting of pages 17, 18, 19 and 20 of the transcript, entitled "EXTRACTS FROM RECORD IN GREGORY *v.* TALBOT, NO. 603, OCTOBER TERM, 1895," is correct as far as it goes, and are all of the transcript of the record of the Circuit Court that is available for the purposes of this motion to dismiss the appeal of Gregory.

It is true that Mr. Talbot has seen fit to include his extracts from the transcript of record in appeal cause 603 under the same cover with the extracts printed for the hearing of appeal cause No. 602, Gregory *v.* Pike, for the apparent purpose of leaving the Court to infer that the two causes depend on the same record, or that the record in 602 makes part of the record in 603.

We now invite the attention of the Court to the statement in this brief (*supra*, p. 2) that

> "It does not appear that . . . Talbot was a party to that suit (meaning the old equity cause No. 2170) or was mentioned or referred to in said bill of complaint, or in said final decree."

We now proceed a step further and show to the Court that the record, as printed for this hearing, not only fails to connect Talbot in any way with the old equity cause of Gregory against Pike and Swift, except as counsel for Pike, but that if certain omissions of

dates in the record are supplied, it also fails to show that said Talbot ever became an intervening petitioner in that old cause. That old cause (No. 2170) certainly came to an end on the 8th day of March, 1894, the date of the final decree, if not before that day.

The petition of Thomas H. Talbot by which he became an *intervenor* in the old cause 2170 (if he ever became one at all) was not filed in the Circuit Court until March 13th, 1894, — five days after the entry of the final decree in that old cause.

The record as printed by Talbot for this hearing fails to show at what time that petition was filed in the Circuit Court.

Rec., p. 17, top.

The date of that petition is now supplied and shown by means of a certificate furnished by the clerk of the Circuit Court, and the affidavit of the deputy clerk who has examined the original petition now on file in the Circuit Court in equity cause 2170, and testifies from such examination by him made.

These papers, certificate of clerk and affidavit, are filed by us in this court with this brief. We know of no other way of bringing this fact to the attention of the court upon the hearing of this motion, but shall be pleased to adopt any other course for that purpose that we may be advised should be taken. Copies of these papers are hereto annexed, marked, respectively, "Exhibits 1 and 2."

If Talbot had been recognized by the Circuit Court as an intervening petitioner in old equity cause 2170, and his petition had been denied, that fact should and would have been mentioned or referred to in the final decree of March, 1894, and yet he is not mentioned or referred to in that decree in any way. Rec., pp. 8, 9.

There was, therefore, nothing in that decree from which Talbot could appeal, as no decision had been made against him.

It is, however, true that Talbot had, prior to March 8th, 1894, presented a motion to the Circuit Court for an allowance to him of counsel fees as the solicitor of Frederic A. Pike, who had deceased more than seven years previously, and this motion was denied as set forth in a rescript filed March 8th, 1894, the day of the final decree.

Rec., p. 18, top.

The record then proceeds as follows: —

"The said Talbot thereupon, in open court, claims an appeal to the United States Circuit Court of Appeals for the First Circuit, and gives good and sufficient security that he will prosecute his appeal to effect . . . and his appeal is allowed."

A true record. ALEX. H. TROWBRIDGE, *Clerk*.

Rec., p. 18, top.

If it be said in reply to this that it appears, from the record as printed, that the motion overruled March 8th, 1894 (Rec., p. 18, top), was in fact the petition printed at page 17, or should be so construed, then that petition, being a petition of intervention, had been denied by the Circuit Court, and it is settled that a person not being a party to the suit cannot appeal from an order refusing him permission to intervene, and consequently that the appeal afterward allowed to Talbot from said order of denial was improvidently allowed and did not operate to carry his appeal to the Circuit Court of Appeals at all.

Ex parte Cutting, 94 U. S. 14.

The Court there remarked, —

"If one wishes to intervene and become a party to a suit in which he is interested, he must not only petition the Court to that effect, but his petition must be granted."

VI.

Again, if it were true, as claimed by Talbot and as set forth in his motion to dismiss this appeal, that he was a party to the old equity cause of Gregory and Pike deceased, and if the record in that old cause makes part of the record available to both Gregory and himself in the consideration of this motion to dismiss, the said Talbot has left out some parts of said record which have an important bearing upon the question whether the decree of the Circuit Court of Appeals from which Gregory took his appeal was correct.

The Circuit Court of Appeals in its opinion, herein above quoted, finds and holds that the two Swift notes described in the bill of complaint in the old Gregory suit against Frederic A. Pike were held by said Pike as collateral for indebtedness of others to him, and that

the expenses incurred by said Pike in realizing that collateral constituted a proper charge or lien upon the collateral itself.

If a complete record of the old Gregory cause No. 2170 were before this Court at this time, it would appear that the Circuit Court of Appeals was mistaken or in error in this respect as to the facts.

By reference to pages 99 and 100 of the full transcript of record, it will be seen that Mary H. Pike, in a paper styled "Answer of Mary H. Pike, Executrix," and filed in the old equity cause (No. 2170), June 21st, 1887, stated "that the ownership of her testator (Frederic A. Pike) during his lifetime in the mining property in relation to which he entered into the contract of July 31st, 1883, upon the consideration of receiving the Swift notes in controversy in this case, and also, by consequence, his ownership in said notes was in part merely nominal, and not to all proportions real and personal. He did hold a substantial interest to a certain proportion therein" (meaning in the mining property for the security of the purchase money of which he received the Swift notes in pledge), "but beyond that proportion said mining property was owned by the following persons," named by her to the number of sixteen in all.

This indicates a state of facts as to the collateral, entirely different from that set forth in the opinion of the Circuit Court of Appeals, of which the appellant Gregory can have no benefit at this hearing, because it has not been included in the record as printed by the appellee.

The entire transcript of record in appeal cause of Gregory and Mary H. Pike, No. 602, comprises about six hundred pages, while the record as printed for this occasion in both cases, Nos. 602 and 603, contains only twenty pages or only about one-thirtieth part of the whole appeal record.

VII.

From the certificate of the clerk and the affidavit of the deputy clerk of the Circuit Court, placed by us on file with this brief, copies of which are annexed, it will be seen that the statement made at the bottom of page 17 of the record, to the effect that the *petition* of Talbot was heard by the Circuit Court on the 5th day of March, 1894, and that the rescript printed at the top of page 18 of the

record was based thereon, is incorrect, the fact being that said rescript of March 8th, 1894, did not relate to the petition of Talbot but to some motion filed by him in said old cause on or before the 5th day of March, 1894, eight days prior to the time of the filing of the petition printed at page 17 of the record.

It is to be observed in this connection that the provision, to the effect that the rescript or order overruling the petition of March 13th, 1894, should operate retrospectively or as if it had been made on the 6th day of February, 1894, was intended to give effect to the petition as of a date prior to its being filed and prior to the entry of the final decree (March 8th, 1894), and that the Circuit Court had no lawful power to make such an *ex post facto* order or decree, and, consequently, that Talbot did not in fact become an intervening petitioner in said old cause, in season to enable him to appeal from any order or decree of the Court made therein in denial of said petition, so that he had no standing as an appellant from the order or rescript, erroneously stated in this record (page 18, top) to have been made and entered in the old cause March 8th, 1894.

Under these circumstances we do not understand how it would be possible for this Court to issue its mandate, at this late day, to the Circuit Court, directing that Court for the first time to enter a decree in favor of Thomas H. Talbot in the old equity cause of Gregory and Pike, deceased, notwithstanding the fact that Talbot did not become an intervening petitioner in that old cause till after the entry of the final decree therein (March 8th, 1894), even if this Court were now ready not only to dismiss this appeal of Gregory, but to confirm the decree of the Circuit Court of Appeals in favor of Talbot. Talbot was not a party to the decree of the Circuit Court of March 8th, 1894, unless made so by reason of the retrospective effect attempted to be given to the order of March 13th, 1894, overruling Talbot's petition, as of Feb. 6th, 1894. Rec., p. 17, bottom.

As the decree of the Circuit Court of Appeals, made Jan. 31st, 1895, was the first and only decree ever made in the old cause 2170 in favor of Talbot, this Court will perceive either that it must have been appealable by Gregory or that it was not appealable at all, a conclusion not likely to meet the favor of this Court.

F. A. BROOKS, *for the Appellant Gregory.*

EXHIBIT 1.

CIRCUIT COURT OF THE UNITED STATES.

DISTRICT OF MASSACHUSETTS.

IN EQUITY. OCTOBER TERM, 1893.

No. 2170.

CHARLES A. GREGORY *v.* FREDERIC A. PIKE *et al.*

PETITION OF THOMAS H. TALBOT.

[FILED MARCH 13th, 1894.]

And now comes Thomas H. Talbot, an attorney and counsellor of this court, and suggests and states to this Court that the notes of hand, made and signed by W. C. N. Swift, and payable to Charles F. Jones, both of whom are known to the Court as named in the record in this suit, bearing date April 20th, 1883, one for $15,000 and interest, and the other for $20,334.60 and interest, which are the matter in dispute in this cause, having been, by the original defendant, Frederic A. Pike, placed in his hands as such attorney and counsellor, for collection, he did, as soon as, or soon after, said notes respectively became payable, bring suits (Nos. 2435 and 2632) on the same on the law side of this court, in the name of the payee, Charles F. Jones, aforesaid, and prosecuted those suits to judgment, and obtained execution thereon against said Swift; and that upon those executions the debtor Swift paid into the registry of this court, the following sums, to wit: upon the execution upon judgment for the note for $15,000, the sum of $18,823.14 being for debt and interest, exclusive of taxable costs; and upon the execution upon judgment for the note of $20,334.60; the sum of $24,881.59 being for debt and interest, exclusive of taxable costs, making a total sum collected for debt and interest, exclusive of taxable costs, of $43,703.73, which sum was paid into and now remains in the registry of this court, and constitutes, with the interest since accumulated thereon, a fund in the control of this court.

And because said collection has been, and now is, for the benefit of any person or party who has been, or hereafter may be, found to

be rightfully entitled to said fund or to any part thereof, said Talbot prays and moves this court, now that it is making a final disposition and distribution of said fund, to order to be paid therefrom to this petitioner a suitable compensation for professional services rendered, and as counsel fees earned in said collection.

And he respectfully submits that an allowance at the rate of two and a half per cent upon the whole sum, or an allowance of one thousand ninety-two dollars, sixty-two cents will be just and proper ($1,092.63).

THOMAS H. TALBOT.

(Endorsed on the original is the following) : —

"The within petition is overruled as of Feb. 6, 1894.

"LeBaron B. Colt, *Circuit Judge.*"

CIRCUIT COURT OF THE UNITED STATES.

District of Massachusetts.

In Equity.

No. 2170.

Charles A. Gregory *v.* Frederic A. Pike *et al.*

I, Alexander H. Trowbridge, clerk of the Circuit Court of the United States for the District of Massachusetts within the First Circuit, hereby certify that the foregoing is a true copy of the petition of Thomas H. Talbot, filed in the cause entitled "Charles A. Gregory *v.* Frederic A. Pike *et al.*," and of the order of Court passed thereon, being cause No. 2170 on the equity side of said court, and that said petition was filed in said cause on the 13th day of March, A. D. 1894.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court at Boston, in said District, this 12th day of November, A. D. 1895.

Alex. H. Trowbridge,

[L.S.] *Clerk.*

EXHIBIT 2.

I, Benjamin H. Bradlee, on oath, depose and say: —

I am Deputy Clerk of the United States Circuit Court, for the District of Massachusetts, and have examined the papers on file in said court in the cause entitled "Charles A. Gregory *v.* Frederic A. Pike *et al.*," being equity cause No. 2170. Upon such examination, I found the paper, a copy of which entitled "Petition of Thomas H. Talbot" is printed on page 17 of the record in Gregory *v.* Talbot, No. 603, of Supreme Court of the United States at October Term, 1895. Upon the back of said paper is written as follows: —

"T. H. Talbot's petition for allowance of counsel fees.
The within petition is overruled as of Feb. 6th, 1894. LeBaron B. Colt, Circuit Judge. Filed March 13, 1894."

I do not find on file in said cause any other paper signed by Thomas H. Talbot, and placed on file in said cause between Feb. 6th, 1894, and March 9th, 1894.

BENJAMIN H. BRADLEE.

UNITED STATES OF AMERICA,
MASSACHUSETTS DISTRICT, ss.

BOSTON, Nov. 13th, 1895.

Subscribed and sworn to,
Before me,
ALEX. H. TROWBRIDGE,
Clerk United States Circuit Court,
Massachusetts District.